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Issue date: 18Apr2001

Case No.: 1999-CAA-24

In the Matter of:

MICHAEL C. GROSS,
Complainant

against

RADIAN INTERNATIONAL, and
ENVIRONMENTAL DIMENSIONS, INC., and
STONE AND WEBSTER,
Respondents

APPEARANCES:

MICHAEL C. GROSS, Pro se,
On behalf of the Complainant

C. WAYNE DAVIS, ESQ.,
On behalf of Employer, Environmental Dimensions, Inc.

KELLY C. KOCUREK, ESQ.,
On behalf of the Employer, Radian International

BEFORE: RICHARD D. MILLS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Jurisdiction

This case arises under the environmental whistleblower protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. §7622, and the Comprehensive Environmental Recovery, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9610, and the regulations promulgated thereunder which are found at 29 C.F.R. Part 24. The matter is before the undersigned Administrative Law Judge pursuant to the

Complainant's request for a hearing.[1]

II. Procedural History

By letter received July 26, 1999, Complainant, Michael C. Gross ("Complainant" or "Gross") filed his complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA").[2] Complainant alleges that his employment which had been contracted out to Respondent Radian International ("Radian") by the Respondent Environmental Dimensions, Inc. ("EDI"), was abruptly terminated on May 17, 1999 due to his complaints to the management of EDI and Radian about Radian's failure to follow rules and procedures for the safe clean up of radiologically contaminated soil at the St. Louis Airport site.

After an investigation, the OSHA Area Director notified the Claimant by letter dated August 16, 1999 that it had determined that his claims could not be substantiated. Additionally, OSHA recommended dismissal of Gross' complaint as untimely. On August 25, 1999, the Court received a request from Gross appealing the Area Director's decision and requesting a formal hearing. Pursuant to notice, a hearing was held before me in St. Louis, MO. on November 3, 1999. All parties were afforded the opportunity at this hearing to present evidence and argument. The Claimant appeared *pro se*, and appearances were made by counsel representing Radian, EDI, and Stone and Webster.[3] Testimony was elicited from Gross and five other witnesses. Documentary evidence was admitted as CX 4-5; EDX 1-11; RIX 1-20; and SWX 1. At the close of the hearing, the record was held open to allow submission of post hearing briefs and additional evidence. The parties subsequently agreed on January 21, 2000 as the deadline for submission of their briefs. Complainant, EDI, and Radian all timely submitted post hearing briefs.

III. Issues Presented

Three basic issues are presented by this case:

1) Whether Complainant timely filed his complaint with OSHA under the requirements of the CAA and CERCLA;

2) Whether the Complainant engaged in whistleblower activities protected by the CAA and/or CERCLA; and

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[1] Complainant's request for a hearing before this Court was filed in writing on August 25, 1999 and is included in the record.

[2] Complainant asserts that he had notified OSHA of his Claim as of June 10, 1999. He says that on that date he called the OSHA regional office to report his claim and was later advised by OSHA personnel that June 10, 1999 would serve as his complaint date.

[3] Respondent, Stone and Webster, was dismissed from this case based on the Court's finding that they had not materially participated in decisions relating to EDI's employment of Mr. Gross. (TX, p. 200).

3) If the Complainant did engage in such activities, whether the Respondents terminated his employment in retaliation for the protected activities or for legitimate, non-discriminatory reasons that are unconnected with the Complainant's protected activity.

IV. Findings of Fact and Conclusions of Law

A. Background and Employment History

The events in this case took place at a hazardous waste site in St. Louis, Missouri (the "SLAPS") site. The site had become contaminated with low level radioactive material. As a result, Radian was contracted to remove part of the low level radioactive waste from the site and prepare the site for Stone and Webster's subsequent and larger removal action.[4] (TX, pp. 480-482). EDI was then subcontracted by Radian to provide technical consulting and radiological controls on the site. (TX, p. 488). EDI's technicians were responsible for providing radiological assistance and support to the larger Radian SLAPS project. (TX, pp. 227-228; TX, p. 488).

Michael Gross was hired by Mike Bradshaw, EDI's supervisor on the SLAPS project, as a junior health physics technician in approximately July of 1998. Mr. Bradshaw testified that Gross' contract was originally supposed to last only three to six months. This job included activities such as access control to the contaminated areas of the site, collection of soil samples, and perhaps water and air samples depending on the project.[5] (TX, pp. 229-230).

In order to protect the safety of the site, Radian was required by the Corps of Engineers contract to develop a detailed safety plan. Radian submitted that plan to the Court as Radian Exhibit 5. Following review and comment by the Corps, that plan was approved by the Corps. The Corps of Engineers approval was submitted to the Court as Radian Exhibit 6.

Radian also prepared an environmental protection plan as part of their contract with the Corps of Engineers. That plan is in evidence as Radian Exhibit 7. Tom Sherrod testified that the environmental

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[4]Radian's contract with the Army Corps of Engineers was established based on the Corps' request for proposal, which is Radian's Exhibit 1. (RDX-1). The request for proposal gave the specifications for conducting the work and outlined the general scope of the work. It was subsequently amended by agreement between the Corps and Radian. (TX, p. 487; RDX-2). Radian's services were contracted by the Corps of Engineers delivery order. (TX, p. 487; RDX-3).

[5]Tom Sherrod testified to the accuracy of this information. (TX, p. 490).

protection plan was also submitted to and approved by the Corps of Engineers. (TX, p. 494). The approval of the Corps is presented to the Court as Radian Exhibit 8. Sherrod testified that the plan was implemented on the project site and that quality assurance was directly under the supervision of one Kevin Mitchell. (TX, p. 495). Sherrod also stated that if Radian saw or became aware of something that needed to be changed or remediated in its environmental protection policies they would change it. (TX, p. 497). There was no formal procedure for employees to seek this kind of remediation, but Sherrod explained that any problems were supposed to be voiced at the morning safety meetings on the site. (TX, p. 497). In fact, such informal reports were encouraged. (TX, p. 498).

As part of the environmental protection plan, Radian personnel monitored the project on a daily basis to ensure compliance with the plan. The project manager testified that none of Radian's oversight personnel ever advised him of any violations of the CAA or CERCLA. (TX, p. 498). EDI also monitored compliance with the environmental protection plan with respect to the particular sections of the project that their personnel worked on. Sherrod testified that EDI personnel never reported a CAA or CERCLA violation to him during the project. Likewise, the Corps of Engineers, who monitored the site for compliance with the environmental protection plan on a daily basis never reported a violation of the CAA or CERCLA to Radian. (TX, pp. 499-500). Finally, certain Missouri state agencies also participated in environmental monitoring of the site. According to Sherrod's testimony, none of those agencies ever reported a CAA or CERCLA violation either. (TX, p. 500).

Radian's contract with the corps also contained a provision that the contract could be terminated if Radian violated state or federal law. That provision would include violations of the CAA and CERCLA. Sherrod testified that the contract was never terminated and that Radian finished its entire project on the SLAPS site. (TX, p. 501). Sherrod also testified that Gross never documented or otherwise reported to Sherrod any violation of the CAA or CERCLA or their implementing regulations.[6] (TX, p. 501).

Bradshaw explained that, as part of his job, Gross was issued a log book. He was asked to record any significant events involving radiological concerns in this log book. Anything requiring immediate attention was to be brought to the attention of Mr. Bradshaw or another supervisor immediately. Bradshaw testified it would be unacceptable to simply note serious problems in the log book without bringing them to someone's attention. (TX, pp. 230-231). According to Mr. Bradshaw, Complainant did a good job performing these tasks. (TX, p. 233).

The employees' log books were periodically reviewed by the EDI supervisors. Bradshaw testified that when they filled an entire log book, employees were required to turn that log in to the supervisors. The evidence shows that during the time Bradshaw and Gross were at the SLAPS project, there was no

[6]With respect to the dirt spilling from dump trucks near the site, Sherrod testified that in order to constitute a reportable CERCLA violation, Radian would have to dump approximately 3 dump trucks full of dirt onto uncontaminated ground. (TX, pp. 520-521).

documentation of which Bradshaw was aware that showed any radiation violation for the site. (TX, p. 234).

During the course of this operation, Bradshaw testified that the Complainant never complained to him about any specific CAA violation. Gross also never complained of a specific CERCLA violation to Mr. Bradshaw. He never told Bradshaw that he was going to report such a violation to an outside government agency or to the contractors, Radian or Stone and Webster. In fact, according to Bradshaw, Gross never told anyone that such violations might exist. (TX, pp. 239-240).

Complainant's testimony is not substantially different. In direct examination, Gross listed a litany of problems that he felt were endemic to Radian's operations at the SLAPS site. These included improper decontamination of various pieces of heavy equipment, dangerous releases of contaminated dust, and improperly functioning EDI equipment. (TX, pp. 146-158). Gross explained that he regularly reported these problems to the site supervisor from EDI or to one of Radian's personnel. He also stated that he refused to let contaminated equipment leave the DECON pad and that, on a few occasions he shut down work at the site because of dust discharges. (TX, pp. 146, 155, 157).

Tom Sherrod's testimony is in direct conflict with Gross' claims about the DECON pad. Sherrod explained that the specifications of the DECON pad were developed by the Corps of Engineers as a part of their request for proposal. (TX, p. 504; RDX-1, p. 122). Sherrod explained that Radian followed those specifications exactly in their construction of the DECON pad. (TX, p. 505; RDX-9, p. 22). He also testified that the DECON pad was modified with the permission of the Corps to prevent overspray from the pad from contaminating the site's clean zone. (TX, pp. 508-509).

In addition to modifying the pad to prevent overspray contamination, Radian gave EDI employees who were supervising the pad the authority to stop the decontamination process if they observed overspray. Sherrod testified that this was certainly within Gross' authority. (TX, p. 510). It was EDI's job to prevent contaminated equipment from leaving the DECON pad. Sherrod testified that to the best of his knowledge no contaminated vehicle ever left the pad and no Radian employee ever pressured any EDI employee to allow the early release of a vehicle. (TX, p. 512).

Gross also indicated in his testimony that the problems with equipment decontamination were once reported to Keith Enders, the Corps of Engineers on site quality assurance person. (TX, p. 146). That incident occurred when one of the Radian employees attempted to pressure Gross or another EDI employee into releasing a piece of equipment from DECON before it was completely clean. Apparently the Radian employee, identified as Don Conklin, indicated that he had a firearm in his truck and that he would shoot an unidentified EDI employee if a certain piece of equipment was not released. (TX, pp. 145-146).

The Court accepts the fact that the event described above actually occurred. There is no evidence, however, that it was Mr. Gross who was threatened. Further, there is no evidence that Mr. Gross was the EDI employee who reported the problem to Keith Enders. We note that this is the only information in the

entire testimony that even comes close to a report to an outside government agency.

Unfortunately for Mr. Gross, in May of 1999, Radian requested that EDI cure a problem related to Mr. Gross' work on the SLAPS site. On approximately May 13, Bradshaw received a telephone call from Tom Sherrod, Radian's project supervisor which brought up the allegations subsequently contained in Sherrod's letter to Bradshaw of May 14. That letter is offered to the Court as EDI Exhibit 5. Mr. Sherrod's allegations that the complainant was writing graffiti on the site are supported by the Radian incident report which is in the record as RDX-15.[7]

On May 14, 1999, Tom Sherrod, the Radian Project Manager, wrote to Mr. Bradshaw and advised him of the need for immediate cure at the SLAPS site. Specifically, Sherrod indicated that Gross had "repeatedly directed the union work crews under his immediate area control to stop work 30 minutes to an hour earlier than typical stop-work times . . ."[8] (EDX-5). Radian indicated that this had resulted in a substantial loss of production and overpayment of the union workers. According to Radian, Gross had already been observed leaving the work site early while submitting time cards for a full day's pay. (EDX-5).

Mr. Sherrod also advised that the Complainant had been observed writing graffiti on surfaces at the project site. This graffiti allegedly resulted in the destruction of government property. Sherrod advised that without immediate cure, Mr. Bradshaw and EDI would be called upon to reimburse Radian for lost time and property destruction occasioned by Mr. Gross. (EDX-5).

Mr. Bradshaw testified that although Radian demanded immediate cure for this problem they did not instruct him to terminate Mr. Gross. In fact, Radian never instructed Mr. Bradshaw to terminate the Complainant. (TX, p. 242). Based on Radian's allegations, however, Bradshaw conducted an investigation of Mr. Gross. (TX, p. 242).

Initially, Mr. Bradshaw inspected Gross' project clipboard. He inspected the clipboard looking for any information that Gross had prepared that might need to be submitted that day. Bradshaw testified that he had asked Gross not to come in on May 14 based on Bradshaw's previous phone conversation with Tom Sherrod. (TX, p. 243).

Upon inspection of the clipboard, Mr. Bradshaw testified that he discovered several pages of

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[7]Sherrod testified that he wrote that incident report after he caught Mr. Gross writing "Tom Sherrod has no penis" on a bench at the work site. (TX, p. 528).

[8]Sherrod testified that he specifically had caught Gross leaving early and releasing his crew early on May 13, 1999. (TX, p. 531).

graffiti including a pornographic picture. The contents of the graffiti and pornography are described in full detail in the trial record. The Court feels that it is inappropriate to reproduce the material here except to say that it made highly graphic allusions to the sexuality of Mr. Sherrod. (TX, pp. 243-244).

Prior to finding the pornographic material in Complainant's clipboard, Bradshaw testified that there had been one other incident where property was defaced or destroyed by graffiti. In that case, John Reddy, another worker at the SLAP project had asked Mr. Bradshaw to issue the Complainant a new hard hat.[9] When he inspected the Claimant's hard hat, it was filled with graffiti. According to Bradshaw, these were the only two times when he encountered a problem with Mr. Gross' graffiti habit. (TX, p. 245).

The Graffiti problems and the letter from Radian relating to Mr. Gross led Bradshaw to believe that EDI was about to be financially liable for lost time and destruction of equipment and property. Based on this belief, Bradshaw testified that he thought the only alternative was to lay Mr. Gross off and not recommend him for rehire. (TX, pp. 249-250). At the time that Gross was laid off, EDI was in fact laying off other employees in preparation for the transition between the Radian contract and the Stone and Webster Contract. The reason for the lay offs was that the project was wrapping up and there was less need for support. (TX, p. 250). This time frame was, according to the testimony, basically the end of the Radian/EDI contract. Mr. Gross was laid off as of the morning of May 17. (TX, p. 250).

Sometime after his layoff from the EDI position, a position at the Weldon Springs WIZRAP project became available. Complainant testified at trial that he is currently employed with the WIZRAP project in essentially the same capacity that he worked for EDI at the SLAPS site. (TX, p. 309).

Gross denies that he was guilty of writing or drawing any graffiti on the SLAPS site or on his personal equipment at that site. He contends that he was fired because he brought violations of radiation safety procedures including alleged violations of CERCLA and CAA to the attention of EDI and Radian management while working at the site. Radian and EDI contend that Gross did not engage in any whistleblower activity protected by CERCLA or CAA. They also contend that, even if he did engage in such activity, his termination was based on legitimate non-discriminatory reasons which are unrelated to any protected activity. Further, as a preliminary matter, Radian and EDI argue that Gross' complaint was not timely and that he is therefore barred from bringing this complaint.

B. The Merits

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[9]Reddy's incident report was presented to the Court as RDX-14. Tom Sherrod testified that prior to the date of this report, the Corps of Engineers had ordered him to clean the site of any graffiti. (TX, p. 530).

1. Time Bar

Radian and EDI argue that the Complainant's claim is time barred because it was not brought within 30 days of his termination. Most federal employee protection statutes impose a thirty-day statute of limitations on the filing of "whistleblower" complaints.[10] The CAA, section 322(a) (1-3), 42 U.S.C. §7622(b)(1), states that an individual has thirty days from the time of the discriminatory action to file a complaint. A substantially similar provision is included in CERCLA at 42 U.S.C. §9610(b). Any complaint not filed within thirty days is time-barred. *See Greenwald v. City of North Miami Beach,* 587 F.2d 779 (5th Cir. 1979), *cert. denied,* 444 U.S. 826 (1979). It is the Employer's burden to raise the time bar as an affirmative defense. *See Hood v. Sears Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999). In this case, both Radian and EDI have raised the defense and the Court must consider it.

As an initial matter, the Court notes that a complaint under the CAA and CERCLA must be in writing. The procedure for discrimination cases under federal employee protection statutes is laid out in detail at 29 C.F.R. Part 24. That regulation specifically states that ". . . no particular form of complaint is required, except that a complaint must be in writing . . ." 29 C.F.R. §24.3(c). Those regulations also repeat the 30 day statute of limitations stated in the CAA and CERCLA. *See* 29 C.F.R. §24.3(b). Absent a written complaint within 30 days of termination, therefore, the Complainant's claim is time-barred.

Mr. Gross' complaint was not filed within 30 days of his termination. Mr. Gross was terminated on May 17, 1999. (TX, p. 250). At trial, EDI presented a copy of the complaint as Exhibit 9. (EDX-9). Complainant testified that this was the first written complaint that he filed in this case. (TX, p. 345). Gross further testified that the date on the top of the complaint, July 18, 1999, represents the first day that he worked on the complaint's preparation. According to his testimony the complaint was not filed until several days later. He admits that it was received by EDI on July 28, 1999. (TX, pp. 345-346).

The facts of this case leave the Court no choice. Unless there is a compelling reason to hold that the time-bar did not run because of equitable tolling, the Court must dismiss the complaint.

Complainant raises the issue of equitable tolling in his response to Employers' original motion to dismiss. In that memorandum, Gross asserts that the 30 day time limit should be tolled based on information given to him by a member of the OSHA staff in Kansas City. Gross repeats over and over again that he called the OSHA Kansas City office on June 10, 1999, 25 days after his termination and advised them of his complaint. He also urges the Court to find that the OSHA officials told him that his complaint would be recorded as of that day, thus either stopping the statutory clock or allowing a claim for equitable tolling.

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[10] A notable exception is the Surface Transportation Assistance Act with which we are not concerned here.

As evidence of his phone conversations with OSHA Claimant presented a copy of an answering machine tape which he purports includes messages from regional OSHA officials regarding his case. The Court accepts the Claimant's testimony that he called OSHA on June 10, 1999. We cannot accept, however, the tape which he asserts contains answering machine messages from OSHA officials. Such a recording amounts to hearsay and is excluded under the Federal Rules of Evidence. Additionally, the Court cannot verify either the identity of the voices on the tape or the truth of their words with any certainty. Even if the tape were otherwise admissible, the Court would be inclined to assign it little credibility or weight. Further, even if the Court admitted the evidence and gave it some minimal level of credibility or weight, it cannot aid the Complainant's case. Assuming *arguendo* that the tape includes information given by Ed Walton, and further that the information given indicates a June 10, 1999 filing date, at best, this would constitute erroneous legal advice from OSHA or Department of Labor. As the Court will discuss below, such erroneous advice is not sufficient to stop the statute of limitations from running.

OSHA's official position on this case is given in its August 16, 1999 letter to Mr. Gross. In that letter, Edward Walton, the Senior Investigator for OSHA Region VII states that the Complainant's written complaint was not received until July 26, 1999. This date is well after the end of the 30 day period. Mr. Walton therefore recommended the dismissal of the complaint as untimely filed.

Equitable tolling is available to modify the periods provided by employee protection acts. *Tracy v. Consolidated Edison Co. of New York,* Case No. 89-CAA-1, (Sec'y, July 8, 1992). This doctrine focuses on the complainant's excusable ignorance of his statutory rights as a reason to modify the limitations period. *See Andrews v. Orr*, 851 F.2d 146, 150-151 (6th Cir. 1988). Generally, however, this doctrine is applied on a very limited basis. *See School District of the City of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981).

There are three specific situations in which equitable tolling is applied. First, where the employer prevents the employee from filing, equitable tolling may allow additional time to file. *See McConnell v. General Telephone Co.*, 814 F.2d 1311 (9th Cir. 1987), cert. denied sub nom, *General Telephone Co. v. Addy*, 484 U.S. 1059 (1988). Second, where the employee was prevented from asserting his rights by excusable ignorance, the Court may allow for additional time to file. *See City of Allentown*, 657 F.2d at 19. Third, equitable tolling is appropriate when the employee actually filed his claim timely, but did so in the wrong forum. *See id.* at 20.

In this case there is no evidence that either employer, EDI or Radian, prevented Gross from filing his complaint. Gross does not assert this, and the Court does not find any evidence to support it. Gross also admitted in defending against dismissal of the claim that he never filed a written complaint with any other agency.[11] The remaining possibility, therefore, is that Mr. Gross was ignorant of the law and its

[11] The Court notes that Gross did call the Nuclear Regulatory Commission prior to contacting OSHA. He states in his brief opposing dismissal, however, that he never filed a claim with that agency.

requirements. The court finds evidence which specifically contradicts that notion.

When Mr. Gross originally penned his complaint to the Department of Labor in July of 1999 he indicated that he had "spoken with several lawyers regarding this matter, each of whom are more than willing to take the case as my counsel." EDX-9, p. 16. The Court finds that, in the absence of evidence that Mr. Gross was exaggerating his situation in the complaint, he had in fact spoken with legal counsel about this case.[12] This series of conversations may have been enough to establish an attorney client relationship between Mr. Gross and one of the several lawyers he mentions. "Neither contractual formality nor compensation or expectation of compensation is required [to establish an attorney-client relationship]." *Tormo v. Yormack*, 389 F. Supp. 1159, 1169 (D.N.J. 1975). Further, "[o]ne who assumes to give legal advice assumes the role of an attorney." *State v. Morelli*, 377 A.2d 774, 778 (N.J. Super. 1977).

The attorney(s)' ignorance of CAA or CERCLA complaint filing requirements precludes equitable tolling in this case. "Equitable tolling is inappropriate when plaintiff has consulted counsel during the statutory period. Counsel are presumptively aware of whatever legal recourse may be available to their client, and this comparative knowledge of the law's requirements is imputed to [plaintiff]." *Hay v. Wells Cargo, Inc.*, 596 F. Supp. 635, 640 (D. Nev. 1984), *aff'd*, 796 F.2d 478 (9th Cir. 1986).

Further, the fact that the Complainant contacted Department of Labor, through OSHA during the 30 day period should have put him on notice of the need to file a complaint. Complainant argues that his time to file should be waived or extended based on his conversations with OSHA employees stationed at the agency's Kansas City office. However, Claimant's telephone calls with various agency employees cannot be the basis for tolling the limitations period. *See Mitchell v. EG&G (Idaho)*, 87 ERA-22 (Sec'y July 22, 1993) (pp. 8-9). The Court can neither verify nor dispute Gross' testimony about the incomplete or erroneous information that he received from unknown agency employees, and therefore, we cannot justify a tolling of the limitation period. *See Sitarski v. IBM Corp.*, 708 F. Supp. 889 (N.D. Ill. 1989). The complaint filing period can never be told because of any improper or blameworthy actions of the agency. *See Mitchell*, 87-ERA-22 at 10 (*citing School District of City of Allentown v. Marshall*, 657 F.2d 16, 20-21 (3d. Cir. 1981)).

The Court finds no evidence that the Claimant's ignorance of the time period was excusable. Through his admitted conversations with attorneys and/or through his conversations with OSHA Kansas City Gross could reasonably have discovered the actual filing requirements.[13] Because he had spoken with counsel and with the appropriate agency, Gross is charged with constructive knowledge of the time for

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[12] The Court notes, of course, that Gross appeared before it without the benefit of such representation. At the outset of trial he informed the Court that he had attempted to secure representation and was unsuccessful. (TX, pp. 7-9).

[13] In fact, Gross testified that OSHA told him he must file within 30 days. (TX, p. 350).

filing. Since the Complaint was not timely filed within 30 days after his termination, the Court finds that Mr. Gross' complaint is time-barred and should be dismissed.

2. Prima facie case

In addition to their assertion that this case is time-barred, Employer EDI moves the Court for a judgment as a matter of law. EDI is joined in this motion by their co-employer, Radian. The motion is based on the assertion that the Claimant has not presented any evidence that he was terminated because he engaged in protected activity. At trial, the Court reserved ruling on this motion to allow Complainant time to review additional records. (TX, pp. 220-222). If we were to reach the merits of this case, the Court would grant this motion because we believe that Mr. Gross did nothing more than diligently perform his assigned task.[14]

A *prima facie* case of unlawful retaliation or discrimination under the CAA and CERCLA requires a showing that the Complainant engaged in protected activity, that the Respondents subjected him to adverse action, and that the Respondents were aware of the protected activity when they took the adverse action. As the Complainant, Gross must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. *Holtzclaw v. United States Environmental Protection Agency*, ALJ No. 95-CAA-7 (ARB February 13, 1997), slip op. at 3-4.

Protected Activity

The definition of protected activity under the Clean Air Act is found at 42 U.S.C. § 7622. That section provides in pertinent part that

> "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee. . .
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter."

[14]We do not, of course reach the merits, because we have already determined that this complaint is time-barred.

42 U.S.C. §7622(a)(1-3).

Similarly, CERCLA defines protected activity in 42 U.S.C. §9610(a). That section provides that,

> "No person shall fire or in any other way discriminate against . . . any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

42 U.S.C. §9610(a).

The statutory provisions prevents employers from discriminating against employees who take official action to prevent or remedy employer conduct that violates the statute. Both provisions parallel closely with the whistleblower provision of the Energy Reorganization Act, 42 U.S.C. §5851. Employer urges that we should therefore consider the statutory provisions in light of judicial interpretations of this parallel statute. Specifically, Employer points us to the interpretation handed down by the Fifth Circuit in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). The decision in *Brown and Root* specifically held that filing internal reports or raising concerns internally was not protected activity within the meaning of the ERA. *See id.* 747 F.2d at 1036; *see also Macktal v. United States Department of Labor*, 171 F.3d 323, 328-29 (5th Cir. 1999).

The Court notes that the analysis in *Brown & Root* is not religiously followed by all of the circuits. In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), the court affirmed the Secretary of Labor's conclusion that section 5851 of the ERA protects employees from retaliation based on internal safety complaints. A similar conclusion was reached in *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372. In that case, the Court concluded that Congress intended to protect employees from discrimination on this basis as a means of encouraging them to report statutory violations. *See id.* at 377.

The court is not aware of any case squarely on point in the Seventh Circuit. Accordingly, we defer to the decision of the Secretary *Mackowiak*. That decision requires us to find that the Complainant engaged in protected activity if he reported what he reasonably believed to be violations of the CAA or CERCLA either to outside governmental authorities or internal supervisory personnel. The Court concludes that in this case Mr. Gross was simply performing his job, not engaging in protected activity.

Gross testified that the first time he reported to any government agency about the SLAPS site was

when he called the NRC about his termination. (TX, p. 352). Gross testified that this call was placed approximately June 10, 1999. (TX, p. 348). He also testified that he was familiar with some of the basic provisions of CERCLA, but that he had no experience with the CAA. He did not learn

that this was a possible CERCLA or CAA case until after his conversation with Robert Schlicter, an investigator with OSHA. (TX, p. 351). Although no date is given for this conversation, the Court notes that it must have happened after Claimant's initial conversation with OSHA on June 10, 1999.

Mackowiak sets up two modes of protected activity. An employee engages in the first mode when he reports a violation of the CAA or CERCLA to an outside government agency and causes the institution of a government investigation or other proceeding. In this case, the Court finds that Complainant did not engage in protected activity of that type while working for Radian and EDI. No evidence is presented that Gross reported to any government agency until after he was released from his position. But for the decision in *Mackowiak* our analysis would end there.

Under *Mackowiak* a complainant engages in the second mode of protected activity when he engages in purely internal safety activities during his employment. This includes filing nonconformance reports or other formal reports or requests for information when an employee reasonably believes that company activities might result in harm to others. In this case it is difficult to determine whether Gross engaged in the second mode of protected activity. Gross argues that he engaged in such activity when he prevented equipment from leaving the DECON pad and shut down the work site because of the dust hazards.

First, Mr. Gross testified that while he was employed at the SLAPS site and supervising the decontamination pad, he repeatedly prevented Radian personnel from removing heavy equipment from the pad. According to Gross, the equipment could not be properly decontaminated without removing the tracks from it. Radian refused to take that step. (TX, pp. 145-147). Gross testified that he discussed this problem at length with Mr. Bradshaw. Ultimately, Bradshaw instructed Gross to write a list of all of the problems with the decontamination pad and give it to him. Gross testified that he complied with this request. (TX, pp. 149-150). Gross also testified that he was under extreme pressure to decontaminate the equipment more rapidly and return it to service in a timely fashion. (TX, p. 146).

Despite all of the pressure and other problems with the decontamination pad, Gross testified that there was but one piece of equipment on which the tracks were never removed. That piece was a bulldozer. (TX, p. 337). He also testified that the bulldozer was not released from the decontamination pad until he was satisfied that it was fully decontaminated. (TX, p. 339). This testimony is supported by that of Tom Sherrod. (TX, p. 512). Even if the equipment had been released from the DECON pad prematurely, it is unlikely that the dirt caught in its tracks would have caused a reportable CERCLA violation. (TX, pp. 520-521).

The Court concludes, based on the testimony and the evidence, that Mr. Gross was not reasonably reporting company activities which he believed might violate the environmental statutes. Although Gross prevented the bulldozer in question from leaving the decontamination pad, the Court concludes that his job was to make sure that the equipment was fully and properly decontaminated.[15] Gross' activity, therefore, is substantially different than if he had filed a report with the company indicating that radioactive materials were actually being released from the site. Additionally, the Court finds that Gross did not take any formal action to report environmental violations. Preventing equipment from leaving a decontamination pad is not the same as formally reporting environmental violations and beginning an internal inquiry. The Court finds that with respect to his work on the decontamination pad, the Complainant did not engage in protected activity as described by the CAA or CERCLA.

Second, Gross testified that while working on the SLAPS site, he reported the release of dust from contaminated areas. (TX, pp. 155-157). He testified that he specifically reported these releases to the Radian personnel on site at the access control point. (TX, p. 157). According to Gross, as soon as he reported these problems, the Radian personnel would coordinate an effort to control the dust. He also testified that he reported this condition more than once to Mike Bradshaw. (TX, p. 157). Gross explained that he believed the dust releases threatened the surrounding community because the dust came from dirt that was highly contaminated with radioactive material. (TX, p. 152). He estimates that, following Bradshaw's instructions, he shut down the site as many as a dozen times for up to 30 minutes per time. (TX, pp. 157-158).

Tom Sherrod testified that dust control was a specific concern of the environmental plan put together by Radian and approved by the Corps of Engineers for this project. Sherrod testified that the plan accounted for dust problems by preparing the site to prevent them. Specifically, when the excavation crews went to work moving dirt on an area of the site they would station water tanks and hoses near that site. The tanks and hoses would then be used to spray down the site prior to the beginning of excavation work. (TX, p. 516). According to Sherrod, Radian's response to the dust problems was not instantaneous. It was not designed to be. (TX, p. 518). Sherrod explained, however, that even with a delay in the system, there was never a reportable release of any CERCLA regulated material. (TX, p. 520).

The Court finds that these case, like the bulldozer, were not sufficient to rise to the level of protected activity. No investigation was spawned by Mr. Gross' comments or concerns. Instead, we find that Gross' "complaints" to higher level personnel such as Mike Bradshaw were really either basic requests for information about how to perform his job or, alternatively, justifications for his decisions about how to perform his job. The Court is not convinced that any of these activities rose to the level of protection under

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[15]Sherrod testified, as we have noted earlier, that Gross would have the authority to shut down the DECON pad if he determined that the process was violating the environmental plan or that the vehicles were not properly decontaminated. (TX, p. 510).

CAA or CERCLA.

The Court concludes that *Mackowiak* intended to protect workers and others by encouraging workers to report safety or environmental violations.[16] Likewise, the CAA and CERCLA whistleblower provisions are designed to act as remedial measures when employees are terminated because of their concern for the environment. While the law may not require that concern to be vocalized outside of the employee's work-place, it certainly requires a formal vocalization of a legitimate environmental concern. In this case, the Court finds no such activities.

The CAA and CERCLA whistleblower protections apply to activities which are grounded in conditions constituting reasonably perceived violations of environmental statutes. *See Johnson v. Oak Ridge Operations Office*, ARB No. 97-057 (ARB Sept. 30, 1999), slip op. at 8-9; *Crosby v. Hughes Aircraft Co.*, ALJ NO. 85-TSC-2 (Sec'y August 17, 1993, slip op. at 26, *aff'd sub nom. Crosby v. U.S. Dept. of Labor*, 53 F.3d 338 (9th Cir. 1995); *Tyndale v. U.S. Environmental Protection Agency*, ALJ Nos. 93-CAA-6, 95-CAA-5 (ARB June 14, 1996), slip op. at 5-6; *Johnson v. Old Dominion Security*, ALJ No. 86-CAA-3 (Sec'y May 29, 1991), slip. op. at 15. The well-established rule of these cases is that there are jurisdictional limits to the environmental acts. The protective reach of the whistleblower provisions is not so broad as to encompass every employee complaint arising from conditions in a place of employment that falls under environmental laws and regulations.

Case law does support the conclusion that general safety concerns may be protected under the environmental acts. *See, e.g., Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3 (ARB Sept. 29, 1998), slip op. at 10; *Hermanson v. Morrison Knudson Corp.*, ALJ No. 94-CER-2 (ARB June 28, 1996); *Nathaniel v. Westinghouse Hanford Co.*, ALJ No. 91-SWD-2 (Sec'y Feb. 1, 1995). The ARB's decision in Jones agreed with the ALJ's finding that many of complainant's activities were protected because they pertained to the risk of the discharge of toxic substances from a dangerous instrumentality. Slip op. at 11.

We find that Claimant vocalized concerns about three things to his employers. First, he was concerned that vehicles which were not properly decontaminated would be released from the site prematurely. Second, he was concerned that contaminated dust from the site would be released because of heavy truck traffic over dry ground. Third, he was concerned that trucks carrying contaminated dirt out of the site would spill their cargo. The Court concludes that all of these concerns were voiced before an

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[16]The Secretary justified his conclusion in *Mackowiak* by citing *Phillips v. Department of Interior Board of Mine Appeals*, 500 F.2d 772 (1974) (mine's safety procedures regarding safety complaints triggered coverage of the act when miner notified foreman or safety committeeman of safety violations).

actual safety threat existed. As far as we can tell, they were each properly dealt with.

Complainant might have had a legitimate concern with respect to the possibility of releasing dust from the site. His concerns, however, were no more than an ordinary part of his job. They were never voiced to outside authorities or to his internal supervisors.

Awareness of Protected Activity

The second part of the prima facie case requires the complainant to prove that the employers were aware of his participation in protected activity. Gross claims that his protected activity was comprised of reporting environmental problems to contractor and subcontractor supervisors at the SLAPS site. He also includes the several occasions on which he stopped work at part of the site because dust was escaping into other, uncontaminated areas. The Radian project manager, Tom Sherrod, testified that he did not know about any of these claimed violations of CERCLA and the CAA until he received a copy of the complaint filed in this case in July of 1999. (TX, p. 536).

The Court concludes that although Radian and EDI would have had notice of the Complainant's work stoppages and decontamination claims, there was no evidence that either company knew that Claimant felt these were violations of CERCLA or the CAA. The fact that the employers did not find out about the alleged violations until after Gross was fired indicates that they did not know about the allegations at the time they took adverse action.

Adverse Action

Like the problem of awareness, there is little doubt that the employers took adverse action against Gross. The Court finds that he did in fact lose his job with EDI at the SLAPS site. The question, however, centers on the last part of the *Holtzclaw* test, whether complainant has presented sufficient evidence to permit the inference that he was fired because he engaged in protected activity. If the question were reached at all, it would be the considered opinion of the Court that Gross did not.

Gross presented evidence that he was ultimately terminated from his position. He asserts that he was terminated because he brought problems with site operations to the attention of the contractor and the subcontractor that he worked for. The evidence in this case actually suggests that the Complainant was terminated because he made unacceptable comments about his superiors and because he placed graffiti and pornography on government property.

Considering all of the evidence presented by the parties, the Court concludes that Gross was justifiably fired by EDI because of an improper attitude toward his superiors, poor work habits, and the fact that he defaced government and private property. Tom Sherrod testified that he caught Gross in the act of defacing site property on one occasion after another Radian employee had already caught him on

a previous occasion. (TX, p. 528; RDX-15). Sherrod also testified that he caught the Complainant leaving work early on May 13, 1999. (TX, p. 530).

The Court finds that any one of Mr. Gross' indiscretions in the workplace would have been enough to justify terminating his employment. Considered in comparison to vague and unreported claims of environmental violations, the Court finds that they are sufficient to prove that Mr. Gross

was not fired for whistleblower activities protected by the CAA or CERCLA. If the Court were to reach the merits of the case, our conclusion would be that the Complainant was not terminated as a result of protected activity.

V. Recommended Order

It is recommended that the complaint of Michael Gross against EDI, Inc. and Radian International Inc. under the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act be dismissed as untimely.

In the alternative, if the complaint of Michael Gross against EDI, Inc. and Radian International Inc. under the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act is timely, it is recommended that a judgment be entered in favor of Radian and EDI because the Complainant has failed to make out a prima facie case.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).